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# Science Friction: Antarctic Research Whaling and the International Court of Justice

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## ABSTRACT

Whaling remains one of the most controversial and divisive aspects of the modern regulation of marine resources. In 1982, the International Whaling Commission, the global management body responsible for the regulation of whale stocks, instituted a moratorium on commercial hunting, which has been in force for almost 20 years. Nevertheless, a number of legal avenues exist within the current international regulatory framework to facilitate a degree of continued hunting. The most contentious of these is the scientific research exemption advanced under Article VIII of the International Convention for the Regulation of Whaling 1946, which provides for the national authorization of permits for lethal research. Japan has undertaken a significant programme of scientific whaling in Antarctica since 1987, despite widespread international criticism and an escalating campaign of nautical obstruction by militant activists, duly generating a long-standing legal dispute with Australia. On 31 March 2014, judgment was rendered by the International Court of Justice, in favour of Australia, ordering Japan to cease and desist its Antarctic whaling programme and refuting Japanese assertions that these activities had been legitimately conducted 'for the purposes of scientific research' as permitted under the 1946 Convention.

**KEYWORDS:** Whaling, Antarctica, marine scientific research, dispute resolution

## 1. BACKGROUND

Since the founding of the first Antarctic whaling stations in 1904, the Southern Ocean has historically constituted a staple hunting ground for whalers from all corners of the globe.<sup>1</sup> Since 1946, whaling has been governed by the International Convention for the Regulation of Whaling (ICRW)<sup>2</sup> and, more specifically, its

1 See JN Tønnessen and AO Johnsen, *The History of Modern Whaling* (C Hurst & Co 1982) 16–54.

2 161 UNTS 72.

constituent management body, the International Whaling Commission (IWC). Regulatory competence over Antarctic whaling has been accordingly exercised through the IWC since its inception, a position that was explicitly reinforced within subsequent Antarctic treaties.<sup>3</sup> Although Antarctic whaling fell into a steady decline in the 1960s, Japan has consistently maintained an active whaling presence in these waters, which has generated considerable tension in modern Antarctic relations.

In 1982, the IWC instituted a moratorium on commercial whaling. Nevertheless, the ICRW provides three legal avenues to facilitate the continuation of whaling activities. States may enter a reservation, consistent with pertinent rules of international treaty law, to the operation of the moratorium.<sup>4</sup> Alternatively, whaling for Aboriginal subsistence purposes is subject to a special quota regime under the ICRW.<sup>5</sup> Finally, and most controversially, parties may undertake whaling for scientific purposes.

The origins of the current scientific research exception lie in the early multilateral initiatives to regulate whaling. In 1931, an inaugural Convention on Whaling was concluded.<sup>6</sup> Although scientific considerations were ultimately absent from the 1931 Convention, some parties—notably the USA—unilaterally advanced a research exemption within their enabling legislation.<sup>7</sup> A later treaty<sup>8</sup> expressly allowed parties to license their nationals to undertake lethal scientific research, subject solely to restrictions and conditions ‘as the contracting Government sees fit’.<sup>9</sup> Scientific matters affecting whales are today primarily addressed by the IWC through its Scientific Committee. However, autonomy over lethal research had seemingly remained vested in the ICRW parties under Article VIII, which provides:

[n]otwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

Under Article VIII, scientific whaling was apparently subject to a lone obligation to report on such activities to the IWC, with the national authorities ultimately responsible for setting the conditions, scope and duration of permits. This interpretation has been

3 Convention on the Conservation of Antarctic Marine Living Resources 1980; 1329 UNTS 48. Competence over Antarctic whale stocks is expressly deferred to the IWC (Article VI), although the Commission for the Conservation of Antarctic Marine Living Resources retains oversight over krill, the staple prey of many whale species in the region.

4 Art V (3).

5 ICRW Schedule, s 13.

6 Convention for the Regulation of Whaling 1931; 155 LNTS 349.

7 William Roy Vallance, ‘The International Convention for Regulation of Whaling and the Act of Congress Giving Effect to its Provisions’ (1937) 31 AJIL 112, 118–19.

8 International Agreement for the Regulation of Whaling 1937; 190 LNTS 79.

9 Art 10.

heavily criticized by certain national delegations yet has nonetheless remained a fundamental aspect of IWC practice to date.

The scientific whaling exception has provoked controversy since the early years of the IWC. In an echo of current dispute, in 1957, Norway accused the Soviet Union of manipulating scientific activities under Article VIII to gain an enhanced harvest, prompting demands that such permits be allocated on 'a limited and cogent basis'.<sup>10</sup> Thereafter, scientific research occurred on a modest basis,<sup>11</sup> and occupied a comparatively peripheral position within the IWC's agenda. Scientific whaling, however, has expanded on an unprecedented scale since the inception of the commercial moratorium.<sup>12</sup> This has been primarily undertaken by Japan, in the form of its JARPA<sup>13</sup> and JARPN<sup>14</sup> programmes, which coincided with the withdrawal of its national reservation to the moratorium in 1988, due largely to pressure from the USA.<sup>15</sup> Consequently, lethal scientific research has been viewed in many quarters with considerable cynicism, with accusations that it represents little more than a convenient means of circumventing the current commercial restrictions.<sup>16</sup> More contentiously, these activities predominantly occur within a designated IWC whale sanctuary, within which the Commission has called for parties to refrain from lethal research.<sup>17</sup>

The Japanese authorities have argued that lethal research is a valuable and necessary component of their ongoing investigations into whale biology, especially in ascertaining the level of fisheries competition between whales and humans. IWC Resolutions, driven by a majority of the parties and echoing the views of its Scientific Committee, have repeatedly countered that these endeavours offer limited value to the current state of scientific knowledge<sup>18</sup> and, moreover, largely fail to provide data that could not be attained through non-lethal means.<sup>19</sup> In 2003, the IWC

10 Tønnessen and Johnsen (n 1) 579. In 1962, the IWC established that proposed permits should be subject to consultation with the Scientific Committee.

11 For instance, Japan issued permits for an annual scientific catch of three right whales between 1961 and 1963: *ibid* 666.

12 Indeed, the rate of scientific catches in the years between 1986 and 2002 alone was almost three times higher than the entire period between 1949 and 1987: Alexander Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Edward Elgar 2005) 120.

13 The Japanese Whale Research Program under Special Permit in the Antarctic (JARPA) commenced in 1987 in the Southern Ocean and was replaced in 2005 with a second phase, JARPA II.

14 The Japanese Whale Research Program under Special Permit in the North Pacific (JARPN) commenced in the western North Pacific in 1994 and was replaced in 2000 with a second phase, JARPN II.

15 See Andrew Siegel, 'The US-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment' (1985) 19 *Geo Wash J Intl L Ec* 577.

16 C Scott Baker and others, 'Scientific Whaling: Source of Illegal Products for Market?' (2000) 290 *Science* 1695.

17 IWC, *Forty-Eighth Report of the International Whaling Commission* (IWC 1998) 36. Japan contends that the sanctuary was established in an *ultra vires* manner.

18 Notably Resolution 1997-5: Resolution on Special Permit Catches by Japan (noting that JARPA 'does not address critically important research needs for the management of whaling in the Southern Ocean'); Resolution 1998-4: Resolution on Whaling under Special Permit (reiterating a failure by JARPA and JARPN to meet critically important research needs); Resolution 2000-5: Resolution on Whaling under Special Permit in the North Pacific Ocean (noting that the JARPN II programme did not justify the killing of whales); and Resolution 2007-1: Resolution on JARPA (noting that the JARPA II programme did not address critically important research needs).

19 Notably Resolution 1995-9: Resolution in Whaling under Scientific Permit in Sanctuaries (noting that 'with the development of modern [research] techniques it is not necessary to kill whales to obtain the

condemned scientific permits as ‘contrary to the spirit of the moratorium on commercial whaling and to the will of the Commission’, declaring that Article VIII is ‘not to be exploited in order to provide whale meat for commercial purposes’,<sup>20</sup> although the anti-permit rhetoric has since softened considerably. Meanwhile, a large majority of the global scientific community—including numerous members of the IWC’s Scientific Committee—has consistently declared that Japan’s lethal research programmes have generated data of negligible scientific value and fail to meet basic peer-review standards for publication in any meaningful forum.<sup>21</sup>

The issue has been further complicated by the nature of territorial claims in Antarctica. In 1994, Australia established a strongly disputed exclusive economic zone (EEZ) in respect of its claimed Antarctic territory and in 1999 designated these waters a national whale sanctuary.<sup>22</sup> The enforcement of these measures within the Antarctic EEZ has generated an uncomfortable legal and diplomatic conundrum for the Australian authorities. Despite threatening naval enforcement of these restrictions, the practice of successive Australian administrations has been, largely through practical necessity, considerably meeker than their muscular rhetoric has suggested. Notwithstanding a strong distaste for Japanese whaling activities in the region, until the commencement of formal proceedings before the ICJ, there had been little governmental appetite to expose Australian maritime claims to international judicial scrutiny.<sup>23</sup> Likewise, from a more internationalist perspective, Australia has been keen not to disturb the fine diplomatic balancing act that constitutes the Antarctic Treaty System, either through the unilateral enforcement of national law or by importing the controversies attendant to whaling into a regime that has, to date, deftly avoided these difficulties. Injunctions against the Japanese fleet have nonetheless been granted by the domestic courts at the behest of NGOs,<sup>24</sup> even if these are essentially symbolic given that ‘Australia has established a practice of not seeking to

information that is needed for initial implementation of the Revised Management Procedure for a particular whale stock’); Resolution 1997-6: Resolution on Special Permit Catches in the North Pacific by Japan (noting that the JARPN programme makes no advances in knowledge that could not be attained by non-lethal means); Resolution 2003-2: Resolution on Whaling under Special Permit (noting that non-lethal research ‘will usually provide better data at less cost to both animals and budget’); and Resolution 2007-3: Resolution on the Non-Lethal Use of Cetaceans (recognising the ‘valuable benefits’ of non-lethal research, which constitutes ‘a legitimate management strategy’).

- 20 Resolution 2003-2: Resolution on Whaling under Special Permit. Concerns had previously been raised over the potential international trade in whale meat taken for scientific purposes: Resolution 1994-7: Resolution on International Trade in Whale Meat and Products (noting that whale products acquired through lethal research activities should be sold only within domestic markets).
- 21 Indeed, the researchers in question have acknowledged an inability to secure a reputable outlet for their findings: Yutaka Fukui, Hajime Ishikawa and Seiji Ohsumi, ‘Difficulties in Publishing Research Results from Scientific Whaling’ (2005) 21 *Mar Mammal Sci* 781.
- 22 Environment Protection and Biodiversity Conservation Act 1999 (Cth); s 225.
- 23 Natalie Klein, ‘Litigation over Marine Resources: Lessons for the Law of the Sea, International Dispute Settlement and International Environmental Law’ (2009) 28 *Aust Yrbk Int’l L* 131, 155–56.
- 24 *Humane Society International Inc. v Kyodo Senpaku Kaisha Ltd* [2006] FCA 3; see Tim Stephens and Don Rothwell, ‘Japanese Whaling in Antarctica: *Humane Society International Inc. v Kyodo Senpaku Kaisha Ltd*’ (2007) 16 *RECIEL* 243 and Ruth Davis, ‘Enforcing Australian Law in Antarctica: The *HSI Litigation*’ (2007) 8 *Melbourne J Intl L* 6.

enforce its domestic law against foreign nationals in the claimed EEZ off the Australian Antarctic Territory'.<sup>25</sup>

## 2. CASE CONCERNING WHALING IN THE ANTARCTIC

On 31 May 2010, Australia filed formal proceedings against Japan in respect of the JARPA II research programme, which it considered to violate both the specific terms of the ICRW and broader international obligations in respect of the preservation of marine mammals and the environment. The core arguments presented in the extensive Australian memorial centred fundamentally upon the nature of Japanese whaling activities. In particular, Australia argued that the Japanese whaling programme failed to meet the requirements of Article VIII ICRW and, furthermore, represented a thinly disguised intention to continue substantial hunting activities irrespective of the moratorium. Moreover, while 'scientific whaling' was not defined within the 1946 Convention, Australia considered that it ought to be interpreted in the light of Article 31 the Vienna Convention on Law of Treaties (VCLT). The research methodologies applied by the Japanese programme were also considered to fall below those of accepted good practice and could not therefore be considered worthy of the protection of Article VIII. Accordingly, Australia contended that Japan was in breach of the IWC's moratoria on commercial whaling and the use of factory ships and in violation of the terms of the Southern Ocean Sanctuary (SOS).

A robust Japanese response considered that the notion of scientific research ought to be given its ordinary meaning under the VCLT, whereas the lack of a definition of this term within the ICRW failed to provide an objective yardstick by which the JARPN II programme could be judged accordingly. Moreover, the Australian assertions as to good scientific practices were derived from their own expert witness, rather than articulated within a clear and objective provision of international law. Furthermore, Japan stated that it had consistently objected to the designation of the SOS and, indeed, had the right to do so both under general international law and the specific processes internal to the IWC. Accordingly, Japan defended its activities as justified under a long-standing exception to the concept of commercial whaling, for which the provisions of Article VIII had not been disturbed by subsequent revision.

In November 2012, New Zealand sought to exercise its right to intervene in the dispute, which was fully endorsed by the Court on 6 February 2013. Buttressing the Australian submissions, New Zealand further contended that close attention should be paid to the proposed research methodologies of Japan's programme in order for it to be considered legitimate, advocating a precautionary approach and asserting that a state owes a meaningful duty of cooperation in the processes of licensing lethal cetacean research.

Prior to determining the legitimacy of the Japanese programme, the Court was first called upon to consider a jurisdictional challenge on the basis that Australia had reserved from consideration by the ICJ any dispute in relation to the delimitation of

25 Natalie Klein and Nikolas Hughes, 'National Litigation and International Law: Repercussions for Australia's Protection of Marine Resources' (2009) 33 Melbourne ULR 163, 172; see also Joanna Mossop, 'When is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones' (2005) 36 VU Wellington LR 757.

maritime zones and the exploitation of any disputed area within or adjacent to such a zone. Japan argued that the Australian Antarctic EEZ was a disputed area and, since the case concerned the exploitation of marine living resources within, and adjacent to, these waters, the ICJ lacked jurisdiction over the matter. This was ultimately rejected by the Court since the dispute between the parties was not strictly one of the delimitation of maritime boundaries, as the Australian reservation had been intended to address.<sup>26</sup>

### 2.1. Standard of Scientific Review

The central question in the dispute concerned whether Japanese whaling could be legitimately considered ‘scientific’ and thereby justifiable under Article VIII ICRW. A preliminary consideration in this respect was the relationship between Article VIII and the object and purpose of the Convention, which has long been obscured by its preambular imperative to ‘provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry’. It has long been a bone of contention whether this formulation favours preservation or sustainable hunting in the modern era, an issue that was left unanswered in the light of Iceland’s readmission to the IWC pursuant to a reservation to the commercial moratorium.<sup>27</sup> Australia and New Zealand favoured a narrow interpretation to maintain a system of effective collective regulation; Japan advocated a broad approach predicated upon the freedom to engage in high seas whaling. The Court determined that ‘neither a restrictive nor an expansive interpretation of Article VIII is justified’,<sup>28</sup> thereby establishing that while such activities should ‘foster scientific knowledge’, they may also pursue ancillary aims such as wider ecosystem research, which Japan had contended was a fundamental aspect of its programme.

In appraising the compatibility of the Japanese operations with Article VIII, the Court applied an objective standard of review and considered that the term ‘for the purposes of scientific research’ comprises two distinct, yet cumulative, elements: (1) whether ‘scientific research’ was indeed being conducted in this context, and (2) whether the whaling was ‘for the purposes’ of these objectives. This rather stilted formulation presented two main difficulties. First, an objective review of the Japanese programme required consideration of the terms ‘science’ and ‘research’. These are alluded to frequently in treaties but are generally left undefined—to avoid precisely the acrimonious interpretive disputes exemplified in the present case. The Court nonetheless considered it unnecessary to define ‘scientific research’ beyond an acceptance that, while some underlying basis of inquiry is appropriate,<sup>29</sup> lethal methods are not precluded<sup>30</sup> and formal peer-review is not a defining characteristic.<sup>31</sup>

26 Paras 36–37.

27 See Alexander Gillespie, ‘Iceland’s Reservation at the International Whaling Commission’ (2003) 14 EJIL 977. Iceland was largely readmitted on pragmatic grounds, with the parties favouring the participation of a whaling state rather than unilateral activity or the strengthening of a rival regional regime.

28 Para 58.

29 Para 77.

30 Para 83.

31 Para 84.



The Court also appeared to look favourably upon a broad requirement that research programmes should not harm their intended study subject.<sup>32</sup>

Assessing adherence to the inherently indefinable accordingly provoked some consternation among the Panel, with subsequent deliberations considered to be a ‘perilous exercise’.<sup>33</sup> This amplified the second challenge: a judicial body was accordingly required to assess the methodological merits of a scientific programme. International judges have candidly acknowledged their technical limitations<sup>34</sup> and the Panel accepted that international tribunals are generally ill-suited to such demands.<sup>35</sup> Nevertheless, the Court sought to determine whether the JARPA II programme was reasonable in relation to its stated objectives. An initial challenge was raised by the selling of whale meat to underwrite research costs. This is not precluded under Article VIII(2) and the Court ruled that, in itself, selling research-derived meat was permissible, unless lethal sampling had been deployed on a greater scale than is reasonable to achieve the programme’s objectives.<sup>36</sup> Moreover, the fact that such sampling seemingly advances multiple objectives does not render it ‘unscientific’, provided again that it is not advanced on an unreasonable scale with regard to the research objectives.<sup>37</sup>

These research objectives, however, would fatally undermine the Japanese case. Although the Court considered that the Japanese programme could be ‘broadly characterized as “scientific research”’,<sup>38</sup> systemic shortcomings nonetheless afflicted its design and methodology. In particular, the ICJ considered that Japan had an obligation to give ‘due regard’ to pertinent IWC recommendations on lethal sampling and therefore had to demonstrate some evidence of a review of the feasibility of non-lethal methods or, at least, a smaller catch.<sup>39</sup> Whaling on such a scale—especially in the light of the admission that lethal sampling was vital to offset research costs—was not conducted only to the extent necessary to meet scientific objectives.<sup>40</sup> Strong concerns were also expressed as to the sample sizes established for JARPA II in comparison to the initial survey, which ‘cast doubt’ on the validity of ecosystem modelling as the asserted basis for this discrepancy<sup>41</sup> and ‘lent support’ to Australia’s claim that whaling under any guise was an officially sanctioned post-moratorium strategy.<sup>42</sup>

32 The ICJ observed unity between the parties on this point, but noted that no such allegation had been made against the Japanese programme: para 85.

33 *Dissenting Opinion of Judge Bennouna*, 3.

34 David Anderson, ‘Scientific Evidence in Cases under Part XV of the LOSC’ in Myron Nordquist and others (eds), *Law, Science and Ocean Management* (Martinus Nijhoff 2007) 505, 511–12.

35 Paras 69, 82, 172 and 185. Theoretically, the expert-led Special Arbitration process under Annex VIII of the UN Convention on the Law of the Sea 1982 could have facilitated a more scientific review, but neither party has accepted it as a potential settlement forum. *Stricto sensu*, the delimitation question may have also deprived this process of jurisdiction.

36 Para 94; in essence an abuse of right—an issue that was not raised in argument but has been previously alleged by commentators: Gillian Triggs, ‘Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?’ (2000) 5 Asia-Pacific JEL 33.

37 Para 97.

38 Para 127.

39 Para 141.

40 Para 144.

41 Para 153.

42 Para 156.



Moreover, the planned research lacked transparency<sup>43</sup> and was predicated upon an arbitrary period of study unsupported by scientific demands.<sup>44</sup> The failure to land species of strong scientific but low-economic value further eroded the programme's legitimacy,<sup>45</sup> especially since the target sample size was larger than was reasonable in achieving its objectives.<sup>46</sup> A 'limited' publication output<sup>47</sup> and a lack of cooperation with other research institutions<sup>48</sup> led the Court to conclude that while the programme could be considered one of scientific research, 'the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives'.<sup>49</sup> It could not therefore be considered to fall within the purview of Article VIII ICRW.

## 2.2 Margins of Appreciation and International Cooperation

A further issue of significance was the national discretion accorded to lethal sampling. Japan argued that Article VIII conferred a margin of appreciation to the licensing state, whereas Australia and New Zealand contended that the raft of IWC Resolutions on scientific whaling represented evidence of subsequent agreement concerning the implementation of this provision as advanced under Article 31 VCLT. Neither argument ultimately prevailed and the Court ploughed a furrow between these two positions.

On the one hand, the Antipodean contention served to 'overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely',<sup>50</sup> whereas the designation of whaling as scientific 'cannot depend solely on that State's perception'.<sup>51</sup> The Court observed that many of the IWC's Resolutions had been adopted without unanimity—and with the express opposition of Japan—hence could not be evidence of a subsequent universal reinterpretation of Article VIII. Indeed, the IWC is an exceptionally fickle institution and the philosophical trajectory of its Resolutions is decidedly unpredictable. Notably, in 2003, an extensive Resolution proclaimed a strong preservationist ethos for the Commission based upon previous practice;<sup>52</sup> whereas in 2006, it seemingly reorientated itself in favour of sustainable use.<sup>53</sup> Furthermore, voting practices have been less than honourable on occasion, with votes-for-aid suspected of having underwritten the passage of numerous IWC pronouncements.<sup>54</sup> Notwithstanding a broad commitment towards

43 Para 188.

44 Para 193.

45 Para 197.

46 Para 212.

47 Para 219.

48 Para 222.

49 Para 227.

50 Para 83.

51 Para 61.

52 Resolution 2003-1: The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission.

53 Resolution 2006-1: St. Kitts and Nevis Declaration.

54 Gillespie (n 12) 425–46.

consensus,<sup>55</sup> extensive abstentions and opposition suggest that resulting IWC Resolutions do not always reflect a reliable record of the collective mind-set.

The Court instead considered that ICRW parties have a fundamental duty to cooperate with the IWC and, as noted above, must accordingly give 'due regard' to its recommendations. In the present context, this meant that while subsequent Resolutions calling for non-lethal research did not substantively adjust the requirements of Article VIII, Japan was nonetheless obliged to demonstrate evidence of meaningful consideration of these recommendations. A failure to do so—and without raising any tangible dissent to the existence of the obligation of cooperation—further undermined the reasonableness of the venture. It may be speculated whether the requirement to give due regard to the recommendations of treaty-derived advisory bodies by contracting parties may constitute an emerging strand of the wider customary obligation of due diligence owed by states in their activities affecting the environment. The notion of due regard articulated by the Court would, therefore, require a party to the ICRW to demonstrate a credible consideration of the majority position as expressed in IWC Resolutions, even if there is no obligation to ultimately follow such guidance.

### 3. CONCLUDING REMARKS

The judgment in the *Case Concerning Whaling in the Antarctic* represents a decisive reappraisal of one of the more farcical elements of recent IWC practice. It should also establish a welcome reinforcement of the role of scientific review within the whaling regime. The IWC's Scientific Committee is a universally admired collective of leading specialists and largely provided the blueprint for advisory institutions under modern environmental treaties. Post-moratorium interpretations of Article VIII have seen it marginalized in the important context of scientific whaling and subordinated to the judgment of national officials. In redressing this position, the ICJ has struck an effective balance: robust procedural obligations advanced in the judgment entrench both a broad right to conduct lethal sampling and a clearer requirement to objectively justify such a programme where it conflicts with recommended international standards. The future of Antarctic research whaling, however, is rather less certain. Japan has undertaken to adhere to the judgment and must either abandon its Antarctic programme or invest substantial efforts in convincing a sceptical scientific community that its research procedures pass methodological muster. Attempts to institute alternative programmes in other locations will otherwise run the gauntlet of future litigation and a significant escalation in violent at-sea protests.<sup>56</sup>

Curiously, the judgment represents an appraisal of a pressing ecological dispute while largely avoiding consideration of overarching environmental principles, instead favouring an evaluation of essentially procedural requirements. Moreover, as the

55 At the 2008 Annual Meeting, Chapeau E of the IWC's Rules of Procedure was amended to ensure that '[t]he Commission shall make every effort to reach its decisions by consensus'. The 2009 decisions were duly termed 'Consensus Resolutions' although this has not been replicated in the titles of subsequent Resolutions.

56 On recent developments, see Richard Caddell, 'Regulating the Whale Wars: Freedom of Protest, Navigational Safety and the Law of the Sea in the Polar Regions' (2014) 6 Yrbk Polar L (forthcoming).

Court declared, it was not called upon to adjudicate the wider tensions inherent in international whaling policies,<sup>57</sup> which remain acute, multifaceted and seemingly insoluble. The loss of one basis for whaling will further pressurize the IWC moratorium, not least since some stocks have recovered sufficiently to support a degree of commercial activity. This may also have repercussions for alternative treaty regimes, with the whaling debate having previously constituted a corrosive distraction to the work of other fora.<sup>58</sup> As with scientific endeavour generally, the future trajectory of whaling regulation remains challenging to hypothesize and prone to unexpected results.

57 Para 69.

58 Richard Caddell, 'Inter-Treaty Cooperation, Biodiversity Conservation and the Trade in Endangered Species' (2013) 22 *RECIEL* 264, 267–69.